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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 226.

ROSARIO GAMBINO AND JOSEPH LIMA,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA,
RESPONDENT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

POINT I.

The Government brief errs in claiming defendants omitted to object to evidence obtained by unlawful search and seizure.

At page 5 the opposing brief states:

> "No objection was made by the defendants at the trial to the introduction of evidence relating

> to the search and seizure until the Government's fifth and final witness had taken the stand. The objections then interposed and overruled were to testimony of the Government's chemist regarding the contents of a sample of the seized liquor, the ground of objection being that the search and seizure by which the State officers had procured the sample were without warrant of law, State or Federal, and in violation of the defendants' rights under the Fourth, Fifth, and Sixth Amendments" (R., 50, 51, 61).

The references (R., 50, 51, 61) correspond to pages 34, 35, 42 and 43 of the Transcript of Record now before the Court. They show that when offers were made of alleged evidence obtained by the search and seizure, the defendants made timely and appropriate objections on constitutional and other grounds.

Again at page 11 the opposing brief states:

> "That the witness then found the key in the left side pocket of the car, and opening the rear end of the defendants' car found therein fourteen cases of Canadian ale (R., 31). On motion of the defendants, the court struck out that part of the testimony which described the contents of the bottles as Canadian ale and refused to permit the witness to describe the labels on the bottles, on the ground that the labels themselves were the best evidence of that (R., 31). Later, however, the Government was permitted to show by another witness that at the time of its seizure the Buick roadster contained 336 bottles of Canadian ale (R., 46). The testimony of Trooper Carroll was corroborated by that of

Trooper Travis, who additionally testified that Hogansburg was on the border line of Canada fourteen miles from Messena" (R., 34).

The reference (R., 31) corresponds to pages 19 and 20 of the Transcript of Record now before the Court, and reads as follows:

"That on arriving at the police station witness again asked for the key and was told to go ahead and find it; so he did, and found it in the left-hand side pocket of the car. That he opened the rear end of defendants' car and found therein fourteen cases of Canadian ale with the bottles packed tightly neck to neck. On motion of defendants, the Court ordered stricken out that part of the testimony in which the witness designated the contents of the bottles as Canadian ale. That the witness did not taste or smell the contents of any of the bottles. That there were labels on the bottles, but was not allowed to describe the labels or testify to what was on them, because the Court sustained the objection of the defendants that the labels themselves were the best evidence."

The reference (R., 46) corresponds to pages 31 and 32 of the Transcript of Record now before the Court, and reads as follows:

"That there was a Buick roadster, 336 bottles of Canadian ale, a .25 Colt automatic, and a .32 Dreys Revolver, turned over to him by said State Troopers, on that date. That Government's Exhibits Nos. 1, 2, 3, and 4 were so turned over to him. That immediately thereafter he

took four bottles up to the office at Malone and locked them up and next day he turned them over to Mr. Steenbaerge, in the same condition in which he had received them from State Troopers. That Government's Exhibit No. 5 was one of the bottles he had turned over to Mr. Steenbaerge on that day.

"To all of which testimony the defendants, by their counsel, objected on the ground that it was irrelevant, incompetent and immaterial. That it was statements of conclusion or opinion on the part of the witness. That the witness was not shown qualified to give such opinion evidence; and that said evidence was not a statement of facts within the witness' knowledge. But the Court overruled the objections, stating that counsel for the defense might interrogate the witness on cross-examination about his knowledge. To which rulings of the Court the defendants, by their counsel, then and there duly excepted."

This testimony is not "that at the time of its seizure the Buick roadster contained 336 bottles of Canadian ale," as erroneously alleged in the opposing brief. It is merely that certain specified property was turned over to the witness. This was not claimed to have been done in the presence of the petitioners. There was no allegation that any of the property belonged to them or had been taken from them. It was enough, therefore, that this testimony was objected to as irrelevant, incompetent, and immaterial, and that the designation of some of it as "Canadian ale" and the statement that it was turned over to another person in

the same condition as when received by the witness were unwarranted conclusions. The offer of exhibits in evidence was objected to on constitutional and other grounds, as was also the chemist's testimony as to his examination of them.

Hardly less erroneous is the final statement in the above quotation from the respondent brief. The testimony of Trooper Travis nowhere alleged that any "Canadian ale" or other intoxicating liquor was found on the seizure. It flatly failed to corroborate in any way the testimony of Carroll about shaking the car and hearing bottles rattle or about the place at which the arrest was made being known as "Rayno's Garage," and that Rayno was known as a bootlegger; as more fully appears in petitioners' original brief, at pages 19 and 20.

Point II.

The summary of alleged probable cause in the opposing brief is erroneous and contrary to the testimony of the arresting officers.

At page 11, the opposing brief states:

> "It is submitted that where, as in this case, experienced officers patrolling a highway in the vicinity of the Canadian border observe a heavily loaded automobile proceeding from the direction of the border stop at the place of a well-known bootlegger and before any search or arrest is made discover that the load is contained in bottles, they have probable cause for

> belief that the automobile is being used for the illegal transportation of intoxicating liquor."

In the answering affidavit, filed in opposition to the preliminary motion to restrain the use of evidence obtained by the false arrest and subsequent illegal search and seizure, the witness Carroll said:

> "That they met a Buick roadster, which was loaded very heavily. That deponent noticed that the license plates were from a county in the central part of the State. That these facts, together with the fact that the car was heavily loaded and was traveling at a speed of about twenty-five or thirty miles per hour, and from his experience which he has had with the activities in transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor. That deponent and Trooper Travis turned around and apprehended the driver and occupant of said Buick roadster. That said Buick roadster was being driven at that time by Rosario Gambino and the occupant was Joseph Lima" (R., 17).

The facts alleged were merely "That the license plates were from a county in the central part of the State." "That the car was heavily loaded," and "was traveling at a speed of about 25 or 35 miles per hour." There is no suggestion of crime in any of those facts. Not even the court by its warrant could authorize a search and seizure under them. Much less could an officer, acting without warrant, be au-

thorized. Nor is the matter helped by the affiant's statement that "from his experience which he has had with the activities of transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor." Since the affiant does not disclose any facts of his experience, it adds nothing to the basis of his alleged belief. Clearly such belief is not warranted by the facts stated.

Since these were the only allegations of fact in opposition to the preliminary motions, there can be no basis for the claim that in denying same the trial court found as matters of fact that witness Carroll shook the car and heard bottles rattle, or that the car stopped "at the place of a well-known bootlegger." Not only was the witness Carroll contradicted in these allegations by the four witnesses whose affidavits were submitted in behalf of the preliminary motions, but he was not even corroborated by the testimony of the other trooper who testified after hearing such allegations by Carroll. As to the allegation about hearing bottles rattle, the witness substantially contradicted himself in his direct testimony, as follows: "That he opened the rear end of defendant's car and found therein fourteen cases of Canadian ale with the bottles packed tightly neck to neck" (R., 19), and in his cross-examination, as follows: "Witness then testified that at the time he opened the rear compartment of defendant's car at the police station, he noticed that the bottles were packed in well with excelsior or something like that, so that they would not break against

one another, but not packed in tightly, and not loosely, but loose enough to rattle. That he took some of the bottles out of the rear compartment and saw some others taken out, but did not see them all taken out, and saw an attempt made to put them back in, but that all of the bottles would not go back in, because they were not packed the same way, and some of them were put in the front seat of the car" (R., 27). Even if this witness had "kind of lifted the back end of the car and let it drop" (R., 25), he could not have heard bottles clink which were packed in well with excelsior, and so tightly that when some of them were taken out and an attempt made to put them back in they would not all go back in.

Point III.

The cases cited in the opposing brief under "II," in the effort to show that the constitutional provisions are not applicable, are not in point.

All of the above-mentioned cases arose in States having State prohibition laws, with the exception of the seventh case cited. In each of these cases the State officers acted under color of authority of State laws. In none of the cases did they assume to act under Federal authority. The courts held that the fourth amendment is a restraint upon the Federal Government and its agents, and does not apply to the individual conduct of State officers. Even if this be so, it has no application to the instant case, because here the officers acted as Federal agents, with the pur-

pose and intent of enforcing Federal law, and under color of authority of Federal law. This illegal search and seizure was not an incident to some other or lawful procedure. Nor was it their individual misconduct. It was their official act, pursuant to order of the governor of New York State that they should exercise the authority granted to them by Federal statute in the enforcement of this Federal law as part of their official duties. As is cited in petitioners' original brief at page 34, the United States attorney for the Northern District of New York admitted and alleged in his brief before the lower court:

> "It is common knowledge that the Governor of this State, although urging successfully the repeal of the Mullen-Gage State Prohibitory Act, and even now in his recent message, has urged the enforcement of the National Prohibition Act, although opposed to the statute. He announced before this case arose that State officers should take part in the enforcement of the National Prohibition Act, and this action of our State executive is a matter of current history, of which courts have judicial knowledge, and take judicial notice."

It is also a matter of common knowledge and current history, of which courts have judicial knowledge, and take judicial notice; that the Governor of New York State, in successfully urging the repeal of the State Prohibition Law, claimed that State officers are authorized agents of the Federal Government for the enforcement of the National Prohibition Act; and that,

immediately after the repeal of the State Prohibition Law, said Governor, as commander-in-chief of New York State policemen, ordered them to exercise their statutory authority as such Federal agents in the enforcement of said Federal law, as part of their official duties.

Yet the opposing brief argues at page 16:

> "There was no proof in either the Gambino or the Ostrander case that the State officers were acting as Federal agents when making the search and seizure. The only evidence upon the point in the Gambino case was a statement by Trooper Carroll in a deposition filed by the Government in opposition to the motion to suppress evidence. After describing therein the circumstances under which he and Trooper Travis had made the search and seizure, Trooper Carroll stated:
>
> "'Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal officers' (No. 1071, R., 28)."

Perhaps it is "no proof"; but the attention of the trial court was called to Section 26 of Title II of the National Prohibition Act, and the claim was made by counsel that these officers of the law assumed to be acting under the authority and direction of this Federal law (R., 35). Also counsel for defendants attempted to question these officers as to their rights and duties in making such arrests and seizures, "but counsel for the prosecution objected to such questions, and the court sustained the objections" (R., 24).

The "statement of Trooper Carroll," which is referred to as "the only evidence upon the point," is substantially that by observing certain alleged facts, to wit: "That the license plates were from a county in the central part of the State"; "that the car was heavily loaded and was traveling at a speed of about twenty-five or thirty-five miles per hour," he was led to "believe that this was a load of intoxicating liquor." That the officers then "apprehended" the car and arrested the petitioners (R., 17). They then at once proceeded against them in Federal court, and turned the seized property over to Federal Prohibition headquarters. Were the officers here claiming to act "under any claim of Federal authority?" (Weeks *v.* United States, 232 U. S., 383). Or were they claiming to be "operating entirely upon their own account?" (Byars *v.* United States, 273 U. S., 28). If these officers were acting without Federal authority, then were they acting at their personal peril. For it cannot be held in reason that these State officers are not authorized agents of the Federal Government in making such seizures and arrests; and also be held, that citizens are required by law to submit to such seizures and arrests by them.

There seemed to be a kind of zeal in both the district and circuit courts to convict the petitioners, in aid of Volstead enforcement, regardless of the effect upon older principles of law. In vain was it pointed out that to hold that the acts of these officers of the law were not subject to constitutional restraint, was substantially to hold that they were without au-

thority to seize and arrest in any Volstead case, and to give notice to all Volstead violators that they need not submit to such seizures and arrests by them. At the argument before the lower court, while counsel for petitioners was urging that the lawful possession of firearms, without any attempt to use them, was not evidence of conspiracy or of any other crime, Judge Learned Hand remarked, "If they had used them, they would probably be here for murder instead of conspiracy." To which counsel replied, "Would it have been murder? Then these officers must have been acting under authority of Federal law, for there was no State law under which they could have been acting." The same judge later inquired from the U. S. Attorney if it were not a fact that the liquor was actually found in the car. Government counsel replied that it was; that is, that Canadian ale was so found. Counsel for petitioners in reply urged that it was immaterial what was found in the car; that the plaintiffs in error were not there pleading to an indictment, but were arguing points of constitutional law. At substantially the same time, in the Byars case (*supra*), this Honorable Court was re-announcing that sound principle of law, as follows:

> "Nor is it material that the search was successful in revealing evidence of a violation of a Federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system,

> that evidences of crime discovered by a Federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

The lower court, in affirming the judgment of the trial court, wrote no opinion. But it announced orally that this case seemed to come under their decision in Schroeder *v.* United States, 7 F. (2d), 60. That case is distinguished from the instant case in that the city policemen did not claim to act under color of authority of Section 26 of Title II of the National Prohibition Act. Two city police detectives simply saw a man carry a package to an automobile. Their suspicion being aroused, they questioned the man and his answers seemed to confirm their suspicion that there was something wrong about the package. So they seized the same and took it to police headquarters. They made no arrest and made no seizure of the car, or otherwise acted as directed by Federal statute (*supra*). Later the package was opened and found to contain six bottles of gin. "On the following day he took these bottles to the United States chemist in the Federal Building and reported the circumstances to the assistant United States attorney, whereupon an application for a warrant was made, the witness swearing to a complaint at that time." Counsel for petitioners pointed out these essential differences and urged before the lower court that in the Schroeder case the policemen obviously acted without claim or pretense of Federal authority, and that the discovery

of the Federal violation was a mere incident to some other procedure; whereas in the instant case the discovery of a possible Federal violation was the avowed purpose and object of the procedure, and the State policemen clearly did act under claim of Federal statutory authority. A judge of the lower court replied that the Schroeder case (*supra*) was submitted on an agreed statement of facts that the search was made for a violation of the liquor law, and that the cases were therefore not distinguishable. Thus it clearly appears that the decision here complained of was not based on a finding of probable cause to justify the search and seizure, nor on a finding that the State officers acted on their own responsibility and without claim of Federal authority. This decision clearly was that State officers "do not need any search warrant" (petitioners' original brief, page 33) in the enforcement of Federal law, regardless of whether or not they be acting as Federal agents under claim of authority granted to them by Federal statute. As above shown, this decision is contrary to reason and contrary to the applicable decisions of this Court. It should accordingly be reversed.

All of which is respectfully submitted to the attention of this Honorable Court.

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